

TEOH CHOON ENG & ORS.

a

v.

LAM CHUAN POR CH'NG SDN. BHD. & ORS.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 22-396-89]
17 FEBRUARY 1990

b

CONTRACT: *Fraudulent misrepresentation - What constitutes fraud - Sections 20, 54(f) of the Specific Relief Act 1950.*

CIVIL PROCEDURE: *To confirm injunction obtained ex parte - Whether there were serious question to be tried - Where the balance of convenience lay - Discretionary remedy.*

c

The plaintiff averred that the plaintiff as tenant entered into a tenancy agreement on 24 August 1989 with the 1st defendant as registered owner and landlord of the premises for a period of 3 years commencing 1 November 1989 at a monthly rental of RM2,500. The plaintiff and the other partners had registered the business as Zhen Zhen Eating Shop.

d

The 2nd plaintiff further stated that before signing the tenancy agreement the first defendant had told the plaintiffs that the existing tenancy agreement with the 2nd defendants will expire on 8 November 1989 and that the 1st defendant had no intention of renewing the said tenancy.

Despite this the 2nd plaintiff avers that the 2nd defendants continued to occupy the premises even after 8 November 1989 and the 1st defendant's took no action to evict them. The plaintiff's solicitors on 29 November 1989 sent a notice to the 1st defendant to deliver vacant possession to the plaintiffs within 7 days. Failing this the plaintiffs had obtained an order from the Court by *ex-parte* summons on 13 December 1989 that the 1st defendant, by its servants, agents or otherwise be restrained from letting, assigning, subletting or permitting the 2nd defendants, its agents, servants or any other persons other than the plaintiffs to occupy and to carry out any trade/business on premises known as No. 22 Jalan Baru, Off Jalan Tokong, Ipoh (hereinafter "the premises") pending the outcome of this suit and that the 2nd defendants, by its agents, servants or otherwise be restrained from continuing to occupy or/and to carry out any trade/business or otherwise howsoever deal with the premises pending the outcome of this suit.

e

f

The defendants on 2 January 1990 applied to set aside the above order, for assessment of the damages sustained by the granting of injunction and for costs and other relief.

g

The 4th plaintiff who is also the director of the 1st defendant alleges that he was listed as the 4th plaintiff without his consent. He further states that the 1st defendant is a private limited company and the 2nd defendants had been their tenants on the premises. He also alleges that all along he dealt with the 2nd defendant (b) who was the partner of and managing the Chin Chin Eating Shop for the 2nd defendants.

h

The 4th plaintiff also avers that the 1st defendant had purchased the premises from its previous owner subject to the tenancy agreement dated 8 November 1979. Though the tenancy agreement was executed on 8 November 1979 it only commenced on 15 December 1979 and it also provided for the option to renew, which was in fact exercised, for up to a maximum of 10 years.

i

a Due to the 2nd defendant's persistent requests and misrepresentation the 4th plaintiff had agreed to grant the tenancy to the 2nd defendant under the name of a newly registered eating shop and a tenancy agreement was entered into with the 4th plaintiff signing together with the 1st, the 2nd and 3rd plaintiff as tenants and for the 1st defendant as landlord. He had subsequently instructed his solicitors to give notice to the 2nd defendants to vacate.

b The 2nd defendant (d) who also filed an affidavit in support of the application to set aside wherein he affirmed *inter alia* that the date of the commencement of the original tenancy agreement was on 15 December 1979 and the option for renewal had been exercised all along and the tenancy was to expire only on 14 December 1989.

Held:

[1] There was fraudulent misrepresentation - intention to mislead has been proved.

c **[2]** There are serious questions to be tried and the balance of convenience lay in favour of the defendants (a) (c) and (d).

[3] The *status quo* prior to the injunction to be maintained and s. 20 and s. 54(f) of the Specific Relief Act 1950 applicable.

[Defendant's application allowed with costs and damages to be assessed.]

d

Legislation referred to:

Specific Relief Act 1950, ss. 20, 54(f)

For the plaintiffs - V. Vijaya Segaran and Paul P. Subramaniam; M/s. Maxwell, Kenion, Cowdy & Jones

For the first defendant - Chew Gi Boo; M/s. Amin-Tan & Co.

e *For the second defendants (a), (c) and (d) - Sivam Jeevapragasan and Pushpam Subramaniam; M/s. Pushpam & Co.*

JUDGMENT

Abdul Malek Ahmad J:

f By an *ex parte* summons-in-chambers filed on 11 December 1989 on a certificate of urgency, the plaintiffs had applied, and had subsequently obtained the orders on 13 December 1989, for an order that the first defendant, by its servants, agents or otherwise howsoever be restrained from letting, assigning, subletting or permitting the second defendants, its agents, servants or any other persons other than the plaintiffs to occupy and to carry out any trade/business on premises known as No. 22 Jalan Baru, Off Jalan Tokong, Ipoh (hereinafter "the premises") pending the outcome of this suit, and that the second defendants, by its agents, servants or otherwise howsoever be restrained from continuing to occupy or/and to carry out any trade/business or otherwise howsoever deal with the premises pending the outcome of this suit.

g

In support of the application, the second plaintiff had averred in his affidavit that a tenancy agreement had been entered on 24 August 1989 between the first defendant as registered owner and landlord of the premises and the plaintiffs as tenants for a period of three years commencing on 1 November 1989 at a monthly rental of RM2,500. Consequently, with the other partners, he had registered the business as Zhen Zhen Eating Shop on the same date. The plaintiffs had also placed orders to the tune of RM20,000 to purchase furniture, chattels, electrical appliances, beverages and the like for the purpose of starting a coffeeshop. The second plaintiff had further stated that before the signing, the first defendant had told the

i

plaintiffs that the existing tenancy agreement with the second defendants was to expire on 8 November 1989 and that the first defendant had no intention of renewing the said tenancy. This fact is borne out by a letter from the first defendant's solicitors dated 24 August 1989 giving notice to the second defendants to vacate the premises by 8 November 1989. **a**

Despite this sequence of events, the second plaintiff went on to say that the second defendants continued to occupy the premises even after 8 November 1989 and the first defendant took no action to evict them. The plaintiffs' solicitors had on 29 November 1989 sent a notice to the first defendant to deliver vacant possession to the plaintiffs within 7 days. On these facts, the Court had accordingly granted the plaintiffs' application subject to an undertaking for damages. **b**

By a summons-in-chambers filed on a certificate of urgency on 2 January 1990, the defendants had applied to set aside that order, for assessment of the damages sustained by the granting of the injunction and for costs and other relief. Interestingly enough, one of the two supporting affidavits had been affirmed by the fourth plaintiff who is also the director of the first defendant. **c**

He maintained that he had been listed as the fourth plaintiff without his consent. The first defendant, he added, was a private limited company where all the shareholders were members of his family and where he was the manager. The second defendants had been their tenants on the premises and had issued several licences to food hawkers to trade on the premises. He further went on to state that the first plaintiff was the wife of the second defendant (b) and the second plaintiff her brother. He had all along dealt with the second defendant (b) who was the partner of, and managing the Chin Chin Eating Shop for, the second defendants. **d**

The fourth plaintiff had also averred that the first defendant had purchased the premises from its previous owner subject to the existing tenancy agreement on 8 November 1979 between the previous owner and the second defendants which at that time comprised the second defendants (c) and (d). The tenancy agreement had, however, only commenced on 15 December 1979, the date of the grant of the certificate of fitness for occupation of the premises although it was executed on 8 November 1979. It also provided for the option to renew, which was in fact exercised, for up to a maximum of ten years. **e**

At the beginning of 1989, the second defendant (d) had been negotiating with the fourth plaintiff for a renewal of the tenancy when the second defendant (b) had represented to the fourth plaintiff that he should do otherwise as all his (the second defendant (b)'s) other partners in the second defendants had made him do all the work while they did nothing and yet he had to pay each of them RM1,000 a month. To save him all this trouble, he had asked for the tenancy to be given to his wife and brother-in-law, the first and second plaintiffs respectively, and that the fourth plaintiff's name be included as a partner of the new eating shop. Due to these persistent requests, the fourth plaintiff felt sorry for the second defendant (b) and agreed to grant the tenancy to him under the name of a newly registered eating shop and a tenancy agreement was accordingly entered into with the fourth plaintiff signing together with the first, the second and the third plaintiffs as tenants and for the first defendant as landlord. He had subsequently instructed his solicitors to give notice to the second defendants to vacate by letters dated 24 August 1989, 10 October 1989 and 29 November 1989. **f**

At the persistence of the second defendant (b), the fourth plaintiff had instructed his solicitors to proceed with the legal action for recovery of the premises but was subsequently legally advised that the tenancy between the first defendant and the second defendants may still **g**

h

i

- a* be in force then as it was to have commenced on the date of the certificate of fitness (15 December 1979) and not the date of the agreement (8 November 1979). Upon consulting the second defendant (b), he was told that the certificate of fitness date was 25 December 1979. The fourth plaintiff then instructed his solicitors to amend the notice to 25 December 1989 and personally saw the other partners of the second defendants to persuade them to leave. Only then did he discover that he was misled by the second defendant (b) as to the payment
- b* of the RM1,000 each to the other partners as it had been an agreed condition between them that whoever bided successfully to operate the coffeeshop had to pay that amount to the other partners. As such, the fourth plaintiff, as manager of the first defendant, was at that stage of the view that he had been misled into agreeing into signing the said tenancy agreement between the first defendant and the plaintiffs.
- c* The second defendant (d) had also filed an affidavit in support of the application to set aside wherein he affirmed that the date of the commencement of the original tenancy agreement was the date of the grant of the certificate of fitness which was 15 December 1979. The options for renewal had been exercised all along and the tenancy was to expire only on 14 December 1989. On 8 August 1989, he had negotiated for a further renewal with the first defendant for another three years at a monthly rental of RM2,500. He also averred that the second defendant
- d* (b) had also communicated to the other partners his desire to retire from the second defendants' partnership as at the end of October 1989 (which was the date of the expiry of the tender period he had won since 1 February 1985) and had in fact advertised this intention in a Chinese newspaper.
- e* The second defendant (d) also explained that Chin Chin Eating Shop was run by way of tender where any of the four partners could bid to manage the day to day running of the business on condition that the successful bidder had to pay the remaining three partners RM1,000 each monthly as he was entitled to all the profits of the business by virtue of winning the tender.
- f* Having considered all the affidavits, I could come to no other conclusion on the facts but that the whole situation had been masterminded by the second defendant (b) for his own ends. As partners of the second defendants, he was aware that the tenancy agreement between the second defendants and the first defendant was going to expire in November 1989. He had thought it would be around 8 November 1989, in view of the original tenancy agreement date being 8 November 1979, with options to renew for a maximum of ten years. He had, however, overlooked the fact that it came into effect only on the date the certificate of fitness was granted namely 15 December 1979 and not, according to him when told of the matter by the fourth plaintiff, on 25 December 1979.
- g* In the meantime, he had been the last successful tenderer for the running of the second defendants' business since 1 February 1985 and being aware that he could not in all likelihood be successful again for the next tender should the second defendants opt to renew the tenancy, he had misled the manager of the first defendant into thinking that he (the second defendant (b)) was being made use of by the other partners and had coaxed the said manager
- h* to team up with his (the second defendant (b)'s) wife and brother-in-law, namely the first and second plaintiffs, to enter into the new tenancy agreement with the first defendant on 24 August 1989 long before the expiry of the existing tenancy agreement between the first defendant and the second defendants. He had then applied the same day to register the new coffeeshop using the Mandarin version "Zhen Zhen" for the second defendants' existing Cantonese version of "Chin Chin" for its name.
- i*

However, justice being divine, the haste and greed of the second defendant (b) have now showed themselves so clearly from the following facts:

- (a) the new tenancy agreement executed on 24 August 1989 between the plaintiffs and the first defendant was to commence on 1 November 1989 before the expiry of the tenancy agreement between the first defendant and the second defendants even if we take 7 November 1989 to be the expiry date;
- (b) however, things have taken a turn for the worse as the expiry date is actually 14 December 1989 but whichever date is taken, the new tenancy agreement certainly is defective as there is still in force a subsisting tenancy agreement on 1 November 1989;
- (c) it is doubtful whether the manager of the first defendant who is also fourth plaintiff can enter into the new tenancy agreement in both capacities of landlord and tenant being also one of the partners of the plaintiffs' newly registered business;
- (d) in any case, the fourth plaintiff has been listed as such without his consent and has now realised that he had been duped by the second defendant (b) to enter into the new tenancy agreement;
- (e) the relationship of the first and second plaintiffs with the second defendant (b) only confirms the fact that this was part of a diabolical plot by the latter to continue with the profitable business of running the coffeeshop on the premises with a new set of partners as he was well aware that if he did not do as he had done, he would not be able to continue with the business knowing that he would not again be able to win the tender he had got for the last 4½ years;
- (f) this fraudulent intention of the second defendant (b) can also be gathered from the fact that he had misled the fourth plaintiff as manager of the first defendant and had executed the new tenancy agreement as early as late August 1989 to forestall the second defendants renewing the existing tenancy knowing that negotiations were in fact taking place between the first defendant and the second defendants.

The grant of an injunction is a discretionary remedy and the Court had to exercise its discretion based on whether there were serious questions to be tried and where the balance of convenience lay. Here, I was of the view that there were serious questions to be tried and that the balance of convenience lay in favour of the defendants (a), (c) and (d) especially when the plaintiffs had come to get the injunction with unclean hands accentuated by the non-disclosure of material facts with the clear intention of misleading the Court. It is certainly not an excuse for the plaintiffs to now say that the facts not disclosed are not important or relevant. Whosoever applies for an injunction must state all the facts within his knowledge that are material and not only force those considered material.

Also, from the sequence of events, the nature of the contract, and the fact that there is another existing tenancy at the time this tenancy agreement is to come into force, my view was that this was a contract that could not be specifically enforced and s. 20 and 54(f) of the Specific Relief Act 1950 were applicable. As such, an injunction could not and should not in any case be granted and in the circumstances and based on the factors enunciated earlier, I was of the considered opinion that the situation of the parties remains as before

a the injunction was given and that it therefore ought to be set aside with costs. I also ordered the learned Senior Assistant Registrar to assess the damages, if any, sustained by the grant of the said injunction.

Also found at [1990] 1 CLJ 1005

b

c

d

e

f

g

h

i